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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SIXU FANG, Plaintiff and Appellant, v. AHMAD ALAM et al., Defendants and Respondents.	B286139 (Los Angeles County Super. Ct. No. BC514271)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruth A. Kwan, Judge. Affirmed.

Hamburg, Karic, Edwards & Martin, Steven S. Karic, David A. Householder; Lexint Law Group, Robert C. Hsu and Bryon Y. Chung for Plaintiff and Appellant.

Allione & Associates and Paul R. Allione for Defendants and Respondents.

After the failure of the purchase and sale of a gas station with a mini market franchise, the buyer who had deposited $2 million into escrow sued the seller, brokers, and escrow companies. The buyer settled with all defendants except for the seller's broker, recovering $465,743.63 more than he put into escrow. Not satisfied, the buyer proceeded to trial against the broker (1) on a common count for money had and received and (2) for unjust enrichment, seeking restitution of the $172,200 commission, plus prejudgment interest. The trial court found that the broker was not entitled to the commission, but that the buyer could not recover from the broker. The court reasoned that the seller and his broker were co-obligors on the contract debt (Code Civ. Proc., § 877)[1] and the buyer had already been made whole by the money he received in settlement. The buyer appeals from the judgment entered in the broker's favor. We conclude the buyer is not entitled to recover from the broker. Accordingly, we affirm.

BACKGROUND

I. The parties

Plaintiff Sixu Fang, a Chinese national who speaks no English, is a "sophisticated businessman" in international trade, logistics, manufacturing, importing and exporting, and transportation, with businesses throughout the world and hundreds of employees. Fang was interested in making an investment in the United States. His friend had purchased an ARCO gas station and Mini Mart in Los Angeles in 2013, with

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[1] All further statutory references are to the Code of Civil Procedure section unless otherwise noted.

which the friend obtained a green card. The friend introduced Fang to real estate agent Yvonne Yuefang Peng Ryono (Ryono) explaining that Fang was "very interested in doing the same thing." The friend also introduced Fang to immigration attorney Linda Lau, and to transactional attorney Tim Chang.

Fang hired Ryono as his agent "in all respects." Fluent in Mandarin, Ryono understood that Fang wanted to do a transaction similar to the one his friend had done and that qualifying for a green card was an important part of why Fang was considering the gas station. Fang told Ryono, " 'investment is nothing to me. I make so much money in China. . . . All I want is to make sure it qualifies for [a] green card. I want to get a green card for my daughter.' " Ryono brought Fang to the property where the two met with the seller and franchisee, Mohammad I. Kaskas (Kaskas), Kaskas's real estate broker, Ahmad Alam, and Alam's company, Flag.Financial Realty, LLC (together, Alam).

II. The transaction documents

Fang offered to purchase the property and on March 23, 2012, he and Kaskas executed a purchase agreement and joint escrow instructions, and an addendum. The transaction was structured the same way as the one for Fang's friend. It provided for the transfer of "100% ownership of [the] ARCO AM PM, together with" its real and personal property, tangible and intangible assets, and all other interests, including the land, improvements, business goodwill, and fixtures. Also included in the sale was a permit to build a car wash, which Kaskas agreed to help Fang construct.

Fang hired immigration attorney Lau and business attorney Chang to assist him with the purchase and immigration.

Fang decided to use the property to obtain an EB-5 Immigrant Investor Visa, and understood that the car wash would enable him to hire employees in satisfaction of a requirement for that visa.

The total purchase price was $4.6 million,[2] comprised of an initial, nonrefundable $100,000 deposit, plus Fang's agreement to continue making payments on the existing $2.7 million loan from United Central Bank (or, if the bank required, to assume or to pay off the loan), and a balance of $1,700,000 in cash. Fang also agreed to release $200,000 from escrow before April 11, 2012, which amount was explicitly made nonrefundable. Initially, escrow was 60 days, i.e., until May 23, 2012.

The transaction documents addressed broker compensation. In particular, Paragraph 31 of the purchase agreement and joint escrow instructions provided that the buyer and seller agreed to pay compensation to the brokers according to the separate agreement between the brokers and their principals. Compensation was payable upon close of escrow, but if escrow did not close, as otherwise specified in the individual commission agreements.

The commission agreement between Kaskas as principal and Alam as agent provided that the $400,000 commission would be paid upon recording of the deed or, if completion of the transaction was prevented by Kaskas's default, then upon such default. However, if another party to the transaction prevented completion of the deal, then Alam could collect his commission

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[2] The purchase agreement lists the total purchase price as $4.5 million while the escrow instructions reflect a total purchase price of $4.6 million.

only if and when Kaskas received damages by settlement or otherwise.

The escrow instructions also provided that the escrow holder would pay the commissions to Alam and Ryono "forthwith upon close of escrow, paying same from funds deposited into escrow." The seller agreed that in the event of a breach or default of the agreement represented by the escrow instructions, the breaching party would be liable for paying the brokerage commission.

The parties executed a second addendum to the transaction on April 9, 2012 to extend escrow. The addendum provided that escrow would close on May 23, 2012 if Fang wired $200,000 to escrow by April 11, 2012, an additional $200,000 on April 25, 2012, and another $600,000 on May 23, 2012, all of which deposits would be released to Kaskas immediately. Alternatively, Fang could wire all of the remaining funds to close escrow on May 23, 2012. If Fang was unable to close escrow on May 23, but wired an additional $600,000 to escrow and escrow released the total amount of $1 million to seller by May 23rd, Kaskas agreed that escrow could close on July 15, 2012.[3]

By April 20, 2012, Fang had deposited $399,964.00 into escrow. As of May 31, 2012, he had paid $999,984.00, and by June 20, 2012 he had submitted a total of $1,896,857.93. Fang had paid into escrow $2,058,612.06 of the $4.6 million purchase price by July 19, 2012, which combined with his promised

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[3] The trial court ruled that a clause in this addendum providing that these funds would be "non-refundable" was unenforceable.

assumption of the outstanding loan was the amount of the purchase price.

III. The franchise

The escrow instructions listed contingencies for the transfer of the dealership, as opposed to the real property, which included Fang's assumption of the gas contract and franchise agreement (necessitating the franchisor's unconditional written consent), and successful completion of the franchisor's training school. British Petroleum West Coast Products LLC (BP) was the franchisor.

BP required franchisees to own the gas station and work at least 40 hours per week. If the operator was an entity, then the entity's owner had to hold 51 percent or more of the equity or voting rights in the entity, and personally manage the daily operation of the mini market for at least 40 hours per week. Fang did not plan to run the gas station himself.[4] Accordingly, Attorney Chang formed Sunshine Corona LP (Sunshine) on May 25, 2012, to function as the franchisee. Chang arranged for Ryono's company Holy Well Corporation to be Sunshine's general partner holding less than 1 percent interest, while Fang owned the remaining 99 percent of the limited partnership. Fang always fully controlled Sunshine. Ryono testified that she made no independent decisions. She acted only in response to Fang's instructions.

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[4] Fang also believed that his inability to speak English and his lack of citizenship precluded him from personally qualifying as a franchisee. However, it appears that is not a lawful reason for denying a franchise. (Bus. & Prof. Code, § 21148, subd. (c).)

There was no contingency in the transaction documents requiring Fang to obtain an EB-5 Visa. Nor was there a contingency requiring Fang's designee to be qualified as a BP franchisee before the close of escrow. Instead, the documents explicitly provided that Fang would use Kaskas for the mini market dealership until Fang was ready to "employ his own dealership." This transaction contemplated that escrow would close irrespective of whether Fang or his designee could become a BP franchisee.

IV. Escrow period

Fang executed a form removing the buyer's contingencies on April 13, 2012.

Sunshine substituted into the transaction as buyer on June 15, 2012. Also on June 15, 2012, Ryono on behalf of Sunshine entered into an operating agreement with Kaskas for the gas station, which provided that Kaskas would remain as the qualified franchisee for a reasonable time to enable Sunshine's designated person to qualify as franchisee and to assume that role in place of Kaskas. Ryono discussed the terms with Fang and his attorneys before she executed this operating agreement, and understood that she had authority to enter into it.

On July 5, 2012, Ryono on behalf of Sunshine signed an amendment to escrow instructing that if United Central Bank discovered the sale and called the loan, the buyer would be responsible to pay off the loan. The parties extended the escrow closing date to July 18, 2012.

By July 20, 2012, all of the money that Fang deposited into escrow had been released to Kaskas or to others designated by Kaskas. The first $1 million was released as directed by the second addendum. There was no document that authorized the

release of the second $1 million. Ryono testified she did not recall how that second $1 million got released. On July 24, 2012, at Chang's direction, Ryono sent a request to escrow to record title.

Escrow did not close. No deed was recorded in favor of Fang or Sunshine, and neither Fang nor Sunshine obtained possession, custody, or control of the gas station or franchise, or received any money from the operation of the gas station.

In all, Fang deposited $2,058,612.06 into escrow of the $4.6 million purchase price. Alam received $172,000 in commissions on June 20, 2012. Meanwhile, pursuant to the parties' agreement, Kaskas and his son continued to operate the business.

Nine months later, on April 26, 2013, Fang formally notified Kaskas that he was rescinding the purchase agreement. Kaskas's attorney asked that the parties mediate pursuant to the transaction documents to give Kaskas an opportunity to sell the property and give the proceeds of the sale to Fang in mitigation of Fang's damages. Accordingly, on May 15, 2013, Kaskas entered into an agreement to sell the property to a third party.

V. The lawsuit

Sunshine assigned its rights to Fang who filed the instant lawsuit in July 2013 against Kaskas and his son, Alam, Ryono and her realty company, and two escrow companies. The operative complaint alleged five tort causes of action as well as breach of contract, and sought rescission, a constructive trust, restitution based on unjust enrichment, and money had and received.

Fang recorded a lis pendens to prevent Kaskas from selling the property. The trial court expunged the lis pendens in August 2014, which enabled Kaskas to sell the property to a third party

and deposit the $1,682,998.23 in proceeds with the trial court. Fang and Kaskas entered into a settlement of the claims after which the court released the deposited funds along with $16,357.46 in interest to Fang, and Kaskas paid him an additional $450,000.00.

Fang also entered into settlements with all of the remaining defendants except Alam. Fang recovered $350,000 from Ryono and her realty company and $25,000 from the escrow defendants.

After dismissing his tort claims against Alam, Fang proceeded to trial against him on the fourth cause of action seeking restitution based on unjust enrichment and the fifth cause of action on a common count for money had and received, in an effort to recover $172,200 in commission Kaskas paid to Alam, plus prejudgment interest.

VI. The trial and the ruling

The trial court defined the issue at trial as whether Fang "has already been fully compensated for the money that was put into escrow." The testimony concerned who breached the contract, what the franchise requirements were, and what money had been paid to whom.

The trial court ruled that completion of the transaction was not prevented by Kaskas's default as Kaskas had an intent to sell and did sell the property to another party. Instead, the court found, "it is clear Fang changed his mind regarding purchase of the Property. Fang was no longer interested in seeking an EB-5 Visa, and when he realized he needed someone who had to own 51% of Sunshine to be qualified as a franchisee, he decided not to complete the purchase." After reviewing the language of the transaction documents, the court ruled that Alam had not been

entitled to the $172,200 commission he received. Nonetheless, the court ruled that Fang could not recover from Alam. The court relied on section 877 and found that Alam and Kaskas were co-obligors on the contract debt and equitably shared in the harm to Fang, and that Fang had already recovered from the settlements $465,743.63 more than he deposited into escrow. Next, the court ruled that Fang's right to recover a sum certain under Civil Code section 3287 only arose upon the mutual recission of the transaction, i.e., May 15, 2013, when Kaskas entered into the sale with the third party, thereby accepting Fang's recission. The court awarded Fang prejudgment interest (Civ. Code, §§ 3287, subd. (a) & 1692) at the rate of 7 percent (Cal. Const., art. XV, § 1) commencing on that date. After adding prejudgment interest to the money Fang had received in settlement, the court found that he had been made whole by March 22, 2016, the middle of trial.[5] The court entered judgment in Alam's favor, and Fang timely appealed.

DISCUSSION

Fang's contentions can be grouped into two categories: (I) whether the trial court erred in ruling that Fang could not recover from Alam, and (II) whether the trial court erred in fixing the amount and timing of prejudgment interest.

I. Fang is not entitled to recover.

Fang contends on appeal that section 877 does not apply to this action because Alam and Kaskas were not co-obligors on a

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[5] The trial court found that Fang failed to carry his burden on the issue of attorney fees and was not seeking recovery of the attorney fees in determining whether he had been made whole. Fang did not challenge this ruling on appeal.

single contract debt. He further contends that he was entitled to rescind the transaction unilaterally, and that in any event, his motive for rescinding is irrelevant. We conclude, apart from whether these contentions are correct, that the trial court reached the proper result, although for a different reason than that upon which it relied.

Both causes of action at issue here are governed by principles of equity. (*Seeger v. Odell* (1941) 18 Cal.2d 409, 417 [restitution]; *Mains v. City Title Ins. Co*. (1949) 34 Cal.2d 580, 586 [money had and received].) Courts sitting in equity "may employ broad powers in the application of equitable remedies, [but] cannot create new rights under the guise of doing equity." (*Marina Tenants Assn. v. Deauville Marina Development* Co. (1986) 181 Cal.App.3d 122, 134.)

It is a basic tenet of American jurisprudence that a plaintiff is not entitled to recover more than the injury or harm suffered. "Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited." (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158–1159.) Beginning with his answer to the operative complaint against him, Alam took the position both below and on appeal that Fang had already recovered in excess of $450,000 more than he was harmed and was "*not* 'entitled' to any recovery whatsoever."

A. Common count for money had and received

The elements of a cause of action on a common count for money had and received are: "1. That [name of defendant]

received money that was intended to be used for the benefit of [name of plaintiff]; [¶] 2. That the money was not used for the benefit of [name of plaintiff]; and [¶] 3. That [name of defendant] *has not given the money to* [name of plaintiff]." (CACI No. 370, italics added.) " 'A cause of action is stated for money had and received if the defendant is indebted to the plaintiff in a certain sum "for money had and received by the defendant for the use of the plaintiff." ' [¶] This common count is available in a great variety of situations [citations] and 'lies wherever one person has received money which belongs to another, and which in equity and good conscience should be paid over to the latter.' " (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 937.)

" 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . . . . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' " (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 706, fn. omitted (*Interstate Group*).) Thus, " '[a]nything which shows that the plaintiff has not the right of recovery at all [on a common count], or to the extent he claims, on the case as he makes it, may be given in evidence . . . .' " (*Ibid.*)

Alam generally denied the allegations in the second amended complaint and asserted as affirmative defenses, among other things, that the complaint failed to state a cause of action. The evidence supports the trial court's finding that Fang had already recovered $465,743.63 more than the amount he deposited into escrow. Therefore, Alam demonstrated that Fang

" 'has not the right of recovery at all' " on his common count cause of action. (*Interstate Group*, *supra*, 174 Cal.App.3d at p. 706.)

B. Restitution based on unjust enrichment

Turning to Fang's second cause of action, the same result obtains. "An individual is required to make restitution if he or she is unjustly enriched at the expense of another. [Citations.] A person is enriched if the person receives a benefit at another's expense. [Citation.] Benefit means any type of advantage." (*First Nationwide Savings v. Perry* (1992) 11 Cal.App.4th 1657, 1662 (*Perry*); Rest.3d Restitution & Unjust Enrichment, § 1.)[6]

However, "[i]n reality, the law of restitution is very far from imposing liability for every instance of what might plausibly be called unjust enrichment." (Rest.3d Restitution & Unjust Enrichment, *supra*, § 1.) "The fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, *as between the two individuals*, it is *unjust for the person to retain it*." (*Perry*, *supra*, 11 Cal.App.4th at p. 1663, first italics original, second italics added.)

"The emphasis is on the wrongdoer's enrichment, not the victim's loss." (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 542.) But, deciding whether it is unjust for someone to retain a benefit may involve policy considerations. (*Perry*, *supra*, 11 Cal.App.4th at p. 1663.) Also, "the same

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[6] Courts in California have long relied on the American Law Institute's Restatements for guidance. (*Professional Tax Appeal v. Kennedy-Wilson Holdings, Inc.* (2018) 29 Cal.App.5th 230, 240.)

equitable considerations justifying restitution may constitute a defense to a restitution claim." (*Ibid.*) "To be the subject of a claim in restitution, the benefit conferred must be something in which the claimant has a legally protected interest . . . ." (Rest.3d Restitution & Unjust Enrichment, *supra*, § 2, com. b., p.16.)

Here, although the trial court found that the transaction documents did not entitle Alam to a commission, it nonetheless effectively concluded based on circumstances and the equities, that it was not unjust for him to retain it. Fang had already obtained duplicative recovery of nearly a half a million dollars more than the $2 million he deposited into escrow. Most of that money came from Kaskas, who authorized payment of the $172,200 to Alam, and so whether Alam should give up the commission is now an issue between the seller and his broker. Stated otherwise, by the time of trial, Alam had received no benefit "*at the expense of*" Fang (*Perry*, *supra*, 11 Cal.App.4th at p. 1662, italics added), and no benefit to which Fang has a legally protected interest (Rest.3d Restitution & Unjust Enrichment, *supra*, § 2, com. b., p. 16) without improperly obtaining duplicative recovery (*Tavaglione v. Billings*, *supra*, 4 Cal.4th at pp. 1158–1159).

There are situations where "a benefit has been received by the defendant but the plaintiff has not suffered . . . any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched." (Rest., Restitution, § 1, com. e, p. 14.) Under the circumstances here, a fungible benefit has been received by Alam, but Fang *has not suffered any loss*. The equities dictate that Fang should not be

enriched by duplicative recovery of the same item of damage, regardless of who paid it to him.

The trial court here relied on section 877 to conclude that Fang was not entitled to recover from Alam. One of the cardinal purposes of section 877 is to "prevent[] the plaintiff from obtaining an unfair double recovery. . . . It 'assures that a plaintiff will not be enriched unjustly by a double recovery, collecting part of his total claim from one [defendant] and all of his claim from another.' [Citation.]" (*Wade v. Schrader* (2008) 168 Cal.App.4th 1039, 1046.) Our conclusion furthers this same policy consideration.

II. In the absence of injury, Fang is not entitled to prejudgment interest.

Fang contends that the award of prejudgment interest was error because the trial court fixed the rate of seven percent rather than the ten percent he requested, and calculated that interest from the date Kaskas entered into an agreement to sell the property to a third party, effectively mutually agreeing to recission of the transaction.

Section 3287 of the Civil Code establishes the right to recover interest on damages. It reads in pertinent part: "(a) A person *who is entitled to recover damages* certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day . . . [¶] (b) Every person *who is entitled under any judgment to receive damages* based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment . . . ." (Italics added.) Based on the

words of the statute, as Fang is not entitled to recover damages, he is not entitled to recover prejudgment interest.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P.J.

LAVIN, J.